CRIMINAL PROCEDURE

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LEGISLATION

COMMENCEMENT OF SECTION 1 OF THE CRIMINAL PROCEDURE AMENDMENT ACT 65 OF 2008

This Act came into operation in respect of the magisterial district of Pietermaritzburg on 15 February 2011, and for the magisterial district of Highveld Ridge on 31 October 2011. It provides for the postponement of certain criminal proceedings against an accused person in custody awaiting trial to be conducted through audiovisual link (s 159A). This provision is applicable to accused persons over the age of 18 years, who are in custody in a correctional facility in respect of an offence, who have already appeared in court, and whose case has been postponed (in other words, accused persons in custody pending the trial), and are required to appear, or to be brought, before a court in subsequent proceedings. Such accused persons may, for the purpose of a further postponement of the case or consideration of release on bail in terms of sections 60, 63, 63A, 307, 308A or 321, where the granting of bail is not opposed by the prosecutor, or where the granting of bail does not require the leading of evidence, appear before the court by means of audiovisual link. The proceedings will be regarded as having been held in the presence of the accused person if the accused is held in custody in a correctional facility and is able to follow the court proceedings and the court is able to see and hear the accused person by means of audiovisual link. Thus, in terms of section 159A, it will be deemed that an accused person appearing by means of audiovisual link had appeared before a court for all intents and purposes. A court can, however, direct that section 159A should not apply and that the accused should rather appear physically before court. The requirements for audiovisual appearance by an accused person and the technical requirements are set out in sections 159B and 159C respectively (for a

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recent decision on section 159 of the Criminal Procedure Act 51 of 1977, see *S v Dlomo* 2011 JDR 0466 (GNP)).

The 2008 Amendment Act also makes provision for the falling away of certain convictions as previous convictions after the expiry of a fixed period (s 271A), and it provides for the expungement of criminal records of certain persons in respect of whom certain sentences have been imposed after the compliance with certain requirements and the expiry of the fixed period (s 271B). The expungement of criminal records of persons in terms of legislation enacted before the Constitution of the Republic of South Africa took effect, is also provided for in s 271C.

Judges' Remuneration and Conditions of Employment Amendment Bill B12–2011

The Judges' Remuneration and Conditions of Employment Amendment Bill B12–2011 amends the Act by providing for a minimum period of active service as Chief Justice of South Africa and as President of the Supreme Court of Appeal. Provision is made in section 8*(a)* of the Bill for the Chief Justice of South Africa to perform active service as the Chief Justice for a minimum of seven years, or until he/she attains the age of 75 years, whichever event occurs first. In section 8*(b)* provision is made for the President of the Supreme Court of Appeal to perform active service as the President of the Supreme Court of Appeal for a minimum period of seven years, or until he/she attains the age of 75 years, whichever event occurs first.

Constitution Seventeenth Amendment Bill B6–2011 and Superior Courts Bill B7–2011

The Constitution Seventeenth Amendment Bill B6–2011 primarily deals with and amends the court structure of South Africa and the role of different role players in the judiciary. Some of the most important amendments include section 165 of the Constitution of the Republic of South Africa, 1996, which is to be amended to provide that the Chief Justice is the head of the judiciary and that the Chief Justice will exercise responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts. The aim of this amendment is to provide for an integrated system of court governance within a single judiciary.

The various high courts in South Africa are, in terms of sections 166, 169, 172 and 173 to be converted into a single High Court of South Africa comprising Divisions, seats and jurisdictions as determined by the Superior Courts Bill B7–2011. Each province in South Africa will have at least a Division of the High Court. All references to magistrates' courts are furthermore to be removed and substituted by a reference to lower courts. Section 167 of the Constitution is to be amended to establish the Constitutional Court as the apex court with jurisdiction in all constitutional matters and any other matter in which it may grant leave to appeal. The Constitutional Court will consequently be the highest court for all matters, constitutional as well as non-constitutional, with the Supreme Court of Appeal as an intermediate court of appeal.

Code of Judicial Conduct

The Judicial Service Commission Amendment Act 20 of 2008 was assented to on 22 October 2008 and provides for a Code of Judicial Conduct to serve as the prevailing standard of all judicial conduct. The Code provides for the establishment and maintenance of a register of judges' registrable financial interests, the procedures to deal with the complaints about judges, the establishment of judicial conduct tribunals to enquire into and report on the alleged incapacity, gross misconduct or gross incompetence of judges and the procedures for matters incidental thereto. On 19 January 2011, interested parties submitted proposals at a public hearing on the draft Code of Judicial Conduct.

Draft Dangerous Weapons Bill, 2011

Following the decision of the Constitutional Court in *S v Thunzi* 2011 (3) BCLR 281 (CC), the draft Dangerous Weapons Bill, 2011 was published for public comment in Notice 606 of 2011 in *Government Gazette* 34579. The bill purports to repeal and substitute the Dangerous Weapons Act in operation in the areas of the erstwhile Republics of South Africa, Transkei, Bophuthatswana, Venda and Ciskei, and to provide for matters connected therewith.

Accredited Diversion Programmes and Service Providers in terms of the Child Justice Act 75 of 2008

In *Government Gazette* 34659 of 5 October 2011, the Minister of Social Development published the particulars of the recog-

nized diversion programmes and diversion service providers in terms of section 56(3)*(a)* of the Child Justice Act 75 of 2008.

CASE LAW

Private Prosecutions, Application for Permanent Stay of Prosecution, and Extention of Security of Tenure Act 62 of 1997

In *Crookes v Sibisi and Others* 2011 (1) SACR 23 (KZP), the respondents instituted a private prosecution against the appellant on charges of contravening s 23(1) of the Extension of Security of Tenure Act 62 of 1997 (ESTA). (The Director of Public Prosecutions had indicated in April of 2003 that the National Prosecution Authority would not continue with a prosecution as there were no reasonable chances of success.) Throughout the period of 2002 to 2007, discussions between the legal representatives of the private prosecutors and the appellant took place in an attempt to achieve a resolution to the dispute between the parties, but without success. The appellant now applied for a permanent stay of prosecution, contending that his right to a speedy trial (s 35(3) of the Constitution) had been violated, as various summons had been issued against him over the past five years only to be withdrawn, that the threat of prosecution was only an attempt by the respondents to obtain money from him, and that this constituted an abuse of process. He also submitted that the passage of time had resulted in inevitable prejudice against him since witnesses and documents were no longer available and that a private prosecutor was entitled to institute a private prosecution only once and must then pursue or abandon it.

The respondents submitted, however, that the apparent delay in this case was less than two years, and part of this was undoubtedly occasioned by the appellant and his legal representatives.

In this matter it was emphasized that a court will only reach a conclusion that there was an undue delay in prosecution and that it violated a party's right to a speedy trial in extreme cases and in this instance no extreme circumstances existed (para [8]). The appellant's argument, that court documents had been lost, specifically the court order for the respondents' eviction from the farm, was also not accepted. It was held that the onus of proving

that the evictions were unlawful rested upon the private prosecutors and that it was for them to prove that no such court order was obtained (para [9]).

Finally, with regard to the contention that a private prosecutor may only institute a private prosecution once and must then pursue or abandon it, the court considered the relevant provisions of the Criminal Procedure Act. In terms of section 12, a private prosecution must proceed in the same manner as if it were a prosecution at the instance of the State, subject to the provisions of the Criminal Procedure Act and, in this instance, section 23(5) of the ESTA. First, section 7(2)*(c)* of the Criminal Procedure Act provides that a private prosecution must proceed expeditiously, as the certificate (issued in terms of s 7(1) by the National Prosecuting Authority) will lapse after three months of the date of the certificate. In this case, however, the private prosecution was brought in terms of section 23(5) of the ESTA. In terms of this provision, the private prosecutor must give notice to the public prosecutor in whose jurisdiction the intended prosecution will take place and the public prosecutor must respond within fourteen days of receipt of such notice, stating in writing whether he/she intends to prosecute or not (para [14]).

With regard to prosecutions by the National Prosecuting Authority, section 6*(a)* of the ESTA provides expressly for the power to withdraw a charge before an accused is called upon to plead. In such situations an accused is not entitled to a verdict or acquittal in respect of that charge. No similar provisions exist for private prosecutions, however. And in terms of section 11 of the Criminal Procedure Act, a charge against an accused shall be dismissed, if the private prosecutor does not appear on the day set down for the appearance of the accused, unless the court has reason to believe that the private prosecutor was prevented from being present by circumstances beyond his/her control. After such a dismissal, no further private prosecution may be pursued in respect of that charge.

In this matter, it was found that whilst a private prosecutor must bring a private prosecution within three months after having obtained a certificate *nolle prosequi*, a considerable period of time may lapse between the events giving rise to the private prosecution and the person concerned seeking a *nolle prosequi* from the Director of Public Prosecutions. The court held that once this is recognized, the appellant's reliance on section 7(2) of the Criminal Procedure Act provides no support for his argument

(para [19]). And, as in any other prosecution, the private prosecutor is *dominus litus* and has the right to withdraw charges if he or she so wishes (para [22]). The court concluded that it often happens that parties reach a resolution (or attempt to do so) and that a prosecution is withdrawn while they negotiate. This does not bar a private prosecutor from reinstituting a prosecution if such negotiations had failed (para [24]).

See also *S v Naude* 2011 JDR 0839 (GNP).

Does taking advice from legal counsel influence the voluntariness of an accused's plea?

The legal representatives of the applicant in *Pretorius v Director of Public Prosecutions and Another* 2011 (1) SACR 54 (KZP) advised the applicant, who stood arraigned on one count of theft, two counts of fraud, six counts relating to the contravention of a number of sections of the Natal Nature Conservation Ordinance 15 of 1974, and four counts relating to the contravention of the regulations promulgated in terms of that ordinance, to plead guilty to some of these charges. They also advised him that if he (the applicant) did not accept their advice and plead guilty to a number of the charges, the applicant would have to appoint new counsel as they would not be able to assist any further. The prosecutor, in turn, agreed that the remainder of the charges would then be dropped. The applicant accepted this advice and was consequently convicted and sentenced to various terms of imprisonment all of which were suspended on certain conditions. The applicant, however, wanted this conviction and sentence to be set aside arguing that he (the applicant) wanted to plead not guilty to all counts, but the undue pressure by his legal representatives caused him to change his mind and plead guilty to six of the counts. The applicant submitted that he did not act freely and voluntarily when he pleaded guilty (para [8]).

It is trite that the party who wishes to set aside a criminal conviction and sentence on review on the ground of irregularity must, on a balance of probabilities, prove such an irregularity (para [24]). In this matter, it was evident that the applicant's legal counsel had properly and competently advised and counselled him about his options before his plea (para [29]). And, the applicant could have appointed new counsel if he did not agree with the legal advice he received. Also, after pleading guilty, the prosecutor questioned the applicant and his legal counsel and it did not transpire during the questioning that there was any misunderstanding with regard to the guilty plea entered (para [30]).

ARREST WITHOUT WARRANT

In *Minister of Safety and Security and Another v Mhlana* 2011 (1) SACR 63 (WCC), the respondent, an attorney in the employ of the State Attorney, Cape Town, was arrested for riotous behaviour and assault after an altercation with a traffic officer. He was detained for four hours and thereafter charged with assault. After the respondent had made written representations for the prosecution against him not to proceed, the charge of assault was withdrawn by the office of the Director of Public Prosecutions. The respondent thereafter sued the appellants for R100 000 for unlawful arrest and detention, as well as malicious prosecution.

However, when relying upon section 40(1)*(a)* of the Criminal Procedure Act, it is not necessary that the crime (in this instance riotous behaviour) be committed, or that the arrestee be later charged and convicted of the suspected offence. The magistrate of the court below was consequently at fault for describing the arrest as unlawful, because the respondent's behaviour did not comply with all the requirements for a charge of riotous behaviour. The officers on the scene observed behaviour that was *prima facie* criminal, and the fact that the respondent's conduct might not have resulted in a charge of riotous behaviour does not in any way detract from this (para [15]).

In *Aruforse v Minister of Home Affairs and Others* 2011 (1) SACR 69 (GSJ), the applicant, a Burundian national, sought his immediate release from a facility operated by the third respondent for the Department of Home Affairs, where illegal foreigners were detained pending their deportation from the Republic of South Africa. The applicant was arrested as an illegal foreigner on 15 July 2009 and was being detained pending his deportation. From 15 July 2009 to 12 August 2009, the applicant was detained without a warrant in terms of s 34(1) of the Immigration Act 13 of 2002. Section 34(1) of the Immigration Act permits an initial period of detention without a warrant not exceeding 30 calendar days. This period may be reduced if the foreigner requests that his or her detention be confirmed by a magistrate's warrant and if such a warrant is not obtained within 48 hours, the foreigner must be released immediately. However, the initial period of detention can only be extended by a magistrate's court for a period not exceeding 90 calendar days and does not permit a further extension once a magistrate has extended the initial period of detention. On 12 August 2009, the magistrates' court, in terms of section 34(1)*(d)*, extended the applicant's detention for a

period of 90 calendar days. This period expired during November 2009 and was not extended again (para [11]). The 66 applicants in this matter were therefore being detained unlawfully.

In *Coetzee v National Commissioner of Police and Others* 2011 (1) SACR 132 (GNP), the applicant was not released on police bail, which was normal for the alleged transgressions of which the applicant was suspected. *Reynolds and Another v Minister of Safety and Security* 2011 (1) SACR 594 (WCC) concerned a dispute about an arrest and subsequent detention in terms of the Domestic Violence Act 116 of 1998. In *S v Mjali* 2011 JDR 0950 GSJ), the accused's right to liberty and the postponement of a bail application was considered.

See also *Prinsloo v Nasionale Vervolgingsgesag en Andere* 2011 (1) SACR 196 (GNP); *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA); *S v Lekgau* 2011 JDR 0002 (GNP); and *Beka v The Minister of Safety and Security* 2011 JDR 0751 (GNP).

Court's Duty to Give Reasons at the End of Trial, and Promotion of Administrative Justice Act 3 of 2000

In an automatic review in terms of section 302(1) of the Criminal Procedure Act, it transpired that the trial judge gave no reasons for the convictions and sentences at the end of the respective trials (*S v Molawa; S v Mpengesi* 2011 (1) SACR 350 (GSJ)).

Section 93*ter*(3) of the Magistrates' Courts Act provides that it shall be incumbent on a court to give reasons for its decision or finding on any matter where a magistrate sits with assessors and there is a difference of opinion upon any question of fact, or for the decision or finding of the member of the court who is in the minority or, where the presiding judge sits with only one assessor. Also, the word 'judgment' in terms of section 1 of the Act is said to comprise both the reasons for the judgment and the judgment order. The review court in this matter also held that all important findings of fact should be contained in the judgment at the conclusion of the trial and the same should apply in the magistrates' courts in terms of section 93*ter*(3)*(e)* of the Act (para [13]). Reasons for a judgment are furthermore important, as the right to appeal and review is constitutionally entrenched for every accused person in s 35(3)*(o)* of the Constitution. The task of an appeal or review court is consequently much easier if a comprehensive judgment with reasons exists (para [15]). Where a trial

court does not furnish reasons for its findings in the form of a reasoned judgment, the reviewing judge would be disadvantaged in applying the test as to whether the proceedings were in accordance with justice (para [16]).

Moshidi J described the importance of giving reasons for judgments in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), saying that although courts and judicial officers are not organs of State, and their functions and decisions are not administrative action, the meritorious rationale for furnishing reasons for administrative action by organs of State seems highly attractive in this instance (para [20]). It was held that to adopt the rationale for furnishing reasons as prescribed for administrative action under the PAJA would benefit the criminal justice system and achieve the ideals of a fair trial, as envisaged in section 35(3) of the Constitution (para [20]).

Release of Accused on Bail which Does not Include Payment of Sum of Money

The appellant in *S v Jacobs* 2011 (1) SACR 490 (ECP) was awaiting trial on a charge of assaulting his four-month-old child with a hammer. At his first appearance in court, he indicated that he wanted to apply for legal aid and the case was postponed for this purpose. The appellant was granted bail of R800. The bail remained unpaid however and an application was made for the appellant to be released in accordance with the provisions of section 60(2B)*(b)*(i) of the Criminal Procedure Act. This application was refused and the appellant appealed against the refusal of the magistrate to release him on conditions which did not include payment of a sum of money as envisaged in section 60(2B)*(b)*(i).

From the fact that the appellant was granted bail at his first appearance, it was inferred that the trial court was satisfied that the interests of justice permitted the release of the appellant on bail. No enquiry was made, however, as to whether the appellant could afford the bail amount (para [6]). And with each of the appellant's attempts to be released on bail in terms of section 60(2B)*(b)*(i), the magistrate commented that it could not have been the intention of the legislature that, on finding that an accused could not afford to pay bail, the accused could simply be released on conditions which did not include payment of a sum of money. Such practice, it was submitted, would not allow the court the opportunity to consider other factors like the

seriousness of the offence, for example. The magistrate furthermore held that section 60(2B)*(b)*(i) does not remove a court's discretion to consider factors such as the factors that are considered in formal bail applications. The magistrate indicated that if a contrary interpretation of the relevant section was accepted, it would lead to the situation where courts would have to release the accused on a warning with conditions, or remand the accused in custody without bail being set, if the accused does not have money to pay the bail amount (para [8]). Yet, the appellant argued that once it had been found that the interests of justice permitted the release of an accused on bail, considerations such as the seriousness of the offence did not apply when considering the bail amount. Those considerations, it was said, belonged to the first enquiry, whether or not the interests of justice permitted the release of the accused on bail (para [9]).

Roberson AJ held that it has long been recognized that bail should be set in an amount which is affordable, as it would otherwise effectively result in a refusal of bail. The means of an accused should therefore be considered when deciding on a bail amount and other factors may also be taken into consideration. Section 60(2B)*(b)*(i) does not preclude the consideration of other factors when deciding on appropriate conditions for bail to be set. The courts retain a discretion and should accordingly consider all other conditions and considerations before deciding on an appropriate bail amount (para [10]).

In this matter, it was held that the magistrate over-emphasized the seriousness of the offence and did not have regard to the other factors relevant to the bail application.

Duties of Police in Terms of Domestic Violence Act 116 of 1998

In *Minister of Safety and Security v Venter and Others* 2011 (2) SACR 67 (SCA), the appellants appealed against the North Gauteng High Court judgment holding the Minister of Safety and Security liable for damages suffered by the respondents because of the negligent failure by members of the South African Police Service to perform their statutory duties under the Domestic Violence Act 116 of 1998. In terms of this Act, the police have a legal duty to assist complainants to protect themselves in terms of the Act, and to also take active steps to protect complainants.

The first and second respondent in this case had approached their local police station to enquire about obtaining an interdict

to prevent the second respondent's ex-husband from entering their property. They did not pursue this, however. Later, as the behaviour of the second respondent's ex-husband became more threatening, they made a statement at the police station to this effect, but said that they did not want the police to conduct an investigation. They only wanted the police to prevent the second respondent's ex-husband from entering the property. As the behaviour of the second respondent's ex-husband continued unabated, the second respondent again made a statement at the local police station and this time asked that the matter be investigated. Yet nothing was done and the second respondent's husband eventually went to the respondents' house and raped the second respondent and shot and injured the first respondent. The appellants argued, however, that the respondents had failed to prove that their (the appellants') negligence had caused damages, because the respondents themselves were negligent in not obtaining an interdict and taking more active steps to protect themselves. It was submitted that the respondents would probably not have taken steps to protect themselves, even if the police had assisted them, or, at the very least, that their own negligence contributed to what had happened.

Section 2 of the Domestic Violence Act 116 of 1998 (as well as the National Instructions on Domestic Violence issued by the National Commissioner of the SAPS and published in *GG* 20778 of 30 December 1999) imposes a duty on police officers to assist and inform complainants of their rights under the Act (para [19]). On receipt of a domestic violence complaint, wide-ranging duties are imposed on both the station commander and the police officer receiving the complaint. These include that the complaint must be investigated, general assistance must be provided to the parties involved, and specific assistance must be provided where necessary. The complaint must be recorded in the occurrence book as well as the member's pocketbook, and a notice must be handed to the complainant in the language of his/her choice, detailing a complainant's right to lay a charge, or to apply for a protection order, or to do both. The difference between the various remedies must furthermore also be explained to a complainant (para [24]). In this matter, however, the respondents were contributory negligent in failing to obtain the interdict, and this contributed to their harm (para [33]).

Paying Admission of Guilt Fine in Terms of Written Notice to Appear

The accused in *S v Fynn* 2011 (2) SACR 178 (KZP) paid an admission of guilt fine in the sum of R100 in respect of an assault common charge preferred against him in terms of a written notice to appear. The conviction and fine were confirmed by a magistrate on 17 September 2009. On 28 September 2009, however, the accused wrote to the district magistrate to have the case reopened on the ground that he had paid the admission of guilt fine under coercion at the hands of police officers who attended to him at the police station. On closer inspection, the notice appeared to be fatally defective, as it did not disclose the offence with which the accused was charged.

It is an essential prerequisite that any charge referred to in a criminal summons, written notice to appear or information statement must, on its face, be clear and sustainable to the extent that were the accused have opted not to pay the admission of guilt fine but proceed to trial, he or she would have been able to plead to that charge as it stood in the summons, notice or other formal statement (para [11]).

Section 174 of the Criminal Procedure Act and Close at End of Prosecution's Case

The accused and his two co-accused in *S v Masondo: In re S v Mthembu and Others* 2011 (2) SAC 286 (GSJ) stood arraigned on a number of charges and applied for discharge at the close of the State's case. It was emphasized that there is no obligation in terms of section 174 of the Criminal Procedure Act for the court to discharge the accused:

> 'The court is called upon to act judicially with sound judgment and in the interest of justice. A judicial officer may be advised not to place too much stress or emphasis on the say-so or decisions of other judges in previous cases per se. The facts and circumstances of each case should dictate what route to follow and the judge should be led to an equitable, proper and/or just end result by the specific circumstances and evidence inherent or led in the case as coloured and/or informed by recognized rules, practices, laws and procedures' (para [37]).

In this matter, the forensic evidence and the evidence of the pointing-out which had already been accepted against accused 2 were of such a nature that it called for a reply from accused 1.

See *S v Nkosi and Another* 2011 (2) SACR 482 (SCA) and *S v Lunga* 2011 JDR 1072 (WCC).

SEARCH AND SEIZURE WARRANTS

The main question in *Minister of Safety and Security v Van der Merwe and Others* 2011 (2) SACR 301 (CC) was whether search and seizure warrants are valid despite their failure to mention the offences to which the search relates.

The following common law principles of intelligibility were held to require search warrants issued under section 21 of the Criminal Procedure Act to specify the offences in respect of which they are issued. A valid search warrant must in a reasonably intelligible manner: state the statutory provision in terms of which it is used; identify the searcher; clearly mention the authority it confers upon the searcher; identify the person, container or premises to be searched; describe the article to be searched for and seized, with sufficient particularity; and specify the offence which triggered the criminal investigation and name of the suspected offender.

Additional guidelines observed by courts in considering the validity of warrants include: the person issuing the warrant must have authority and jurisdiction; the person authorizing the warrant must satisfy him/herself that the affidavit contains sufficient information on the existence of the jurisdictional facts; the terms of the warrant must be neither vague nor overbroad; the court must always consider the validity of the warrants with a jealous regard for the searched person's constitutional rights; and the terms of the warrant must be construed with reasonable strictness (paras [54]–[56]).

In *Pakule v Minister of Safety and Security and Another; Tefeni v Minister of Safety and Security and Another* 2011 (2) SACR 358 (SCA), the two schools of thought on the application of sections 20 and 22 of the Criminal Procedure Act were considered. In terms of the first school of thought, seized property must be returned to the owner/possessor if the seizure was not based on reasonable grounds. This also applies even though evidence providing reasonable grounds to believe that the article had been involved in the commission of an offence is discovered after the seizure. With regard to motor vehicles for example, this approach is said to apply even if it was subsequently found that the vehicle had been tampered with. The second school of thought, however, proposes that even though the seizure of the article/property was not based on reasonable grounds, if it is subsequently well grounded, the seizure is lawful and the police may retain the article (para [2]).

The first approach is based on a restrictive interpretation of

sections 20 and 22, given that they allow for limitations on fundamental constitutional rights, the right to privacy, and the right to property (para [7]). With regard to motor vehicles, for example, it has been held that where evidence of tampering with engine and chassis numbers is discovered, such evidence in itself constitutes a reasonable ground for believing that a vehicle had been stolen. Such tampering would ground a reasonable belief that the vehicle was stolen and would justify a seizure without warrant or the consent of the owner. It would also justify a seizure where no reasonable belief initially existed that the article had been involved in the commission of an offence (para [8]).

In *Pakule* and *Tefeni*, it was held that when a vehicle is in possession of the police and they ascertain that there are indeed such grounds for a reasonable belief that the item is concerned in the commission of an offence — such as the tampering with engine and chassis numbers — that they should seize the vehicle. If this were not so and the vehicles were returned to their owners/possessors, the police would be acting in contravention of section 68 of the National Road Traffic Act 93 of 1996, which provides that it is an offence to own or possess a vehicle with which there had been tampered (para [26]).

Section 63(5) of Child Justice Act 75 of 2008 and Right to Public Hearing

An adult and minor accused stood arraigned on the murder of Eugene Terre'blanche in the case of *Media 24 Ltd and Others v National Prosecuting Authority and Others (Media Monitoring Africa as Amicus Curiae): In re S v Mahlangu and Another* 2011 (2) SACR 321 (GNP). The applicants in this matter sought the opportunity to have journalists employed by them to attend the proceedings in order to report on the evidence and issues as they emerge. They argued that the trial concerns issues of profound public interest, that the holding of the trial completely closed to the media will significantly limit the right to freedom to receive information of members of the public and undermine the principle of open justice, and that there is a simple mechanism available to protect the best interest of a minor accused, while preserving the right of members of the public to have knowledge of the proceedings (para [7]).

However, section 63(5) of the Child Justice Act 75 of 2008 provides that proceedings in a trial of a minor accused are to be held in the absence of any member of the public, including the

media, unless the child justice court or the presiding officer has granted permission to members of the public to be present. The default position is therefore that the proceedings in a trial of a minor accused be held in the absence of any member of the public, unless special permission is granted (para [8]). The *amicus curiae*, however, argued that while the right to freedom of expression and the vital function of the media fulfils an important role in protecting the public's right to receive or impart information, protecting the principle of open justice and enhancing the constitutional values of openness, responsiveness and accountability, these are not relevant considerations in a section 63(5) enquiry. Rather, the protection of the child's best interest in all matters concerning him/her as well as the child's rights to privacy, dignity and a fair trial must be upheld. The presiding officer's discretion in light of the various constitutional imperatives was furthermore questioned, as well as whether the 'public interest' should be the standard to which the section 63(5) applicants should be held (para [10]).

The court agreed with the *amicus curiae* that the best-interest principle coupled with the law's requirements that the child accused's dignity, privacy and fair trial interest be protected require that section 63(5) be understood to create a default position whereby public attendance at child justice court proceedings are prohibited. However, it must also be accepted that the legislature foresaw the possibility of exceptions. The first part of the provision cannot, however, be interpreted so as to allow the presiding officer from opening the child justice courtroom to a class of persons, such as the media, or the public. And, a court's discretion to grant attendance to such proceedings must be exercised with reference to the values of the Constitution, including the right to freedom of expression and the right to receive information. A balance must therefore be struck between 'fair trial interest' and 'public interest' (para [14]).

Emphasizing the fundamental nature of the rights of children under the Constitution, and with specific reference to section 28(2), which provides that the best interest of a child shall be of paramount importance in all matters concerning that child, the court held that where a minor is the accused, permission for a trial to be heard in open court should be granted on a case-by-case basis, so that it does not militate against the proper consideration of all the relevant circumstances (para [25]). This particular matter attracted public interest due to the status of the deceased,

the fact that the Hawks took over the investigation, that there was a degree of racial tension around the time of the deceased's death and suggestions that the AWB would attempt to avenge the deceased's death. There were also speculations that the death was linked to sexual activities and perceptions that the singing of the song 'Kill the boer' was linked to the killing of the deceased (para [24]). Permission was consequently granted for a restricted number of media personnel to attend the proceedings (para [27]).

Purpose for Arrest and Section 40(1)*(b)* of the Criminal Procedure Act

In *Erasmus v MEC for Transport, Eastern Cape* 2011 (2) SACR 367 (ECM), the plaintiff sued for damages for her unlawful arrest and detention after being arrested at a road block for driving a motor vehicle without a driver's licence, or, alternatively, for failing to carry her driver's licence in the vehicle which she was driving. Despite the fact that an acquaintance brought the plaintiff's driver's licence to the road block, she was still arrested and taken to the police station where she signed and paid an admission of guilt fine. The purpose of the arrest, according to the arresting officer, was to 'educate' the plaintiff on the rules of the road. The arresting officer also did not believe it unlawful to arrest a person for the purpose of education (para [11]).

The treatment of the plaintiff in this matter was held to be completely illegal and unjustified (para [24]).

Arrest in Terms of Section 8(4) of the Domestic Violence Act

The plaintiff in *Greenberg v Gouws and Another* 2011 (2) SACR 389 (GSJ) claimed damages pursuant to his alleged unlawful arrest and detention. It transpired from the evidence that numerous charges had been laid by the complainant against the plaintiff, and he had also been arrested on a prior occasion for not complying with a protection order that the complainant had obtained against him. The plaintiff, however, had never been convicted on any of the charges brought against him. The particular arrest and detention that was the subject of this claim for damages was effected at the police station by the defendant. The defendant had received a number of complaints about the plaintiff and was investigating these claims that the plaintiff allegedly contravened the protection order when the defendant saw him at the police station and arrested him.

Section 8(4)*(b)* of the Domestic Violence Act provides that a member of the police may arrest a suspect, if there are reasonable grounds to suspect that the complainant in a domestic violence dispute may suffer imminent harm as a result of the alleged breach of the protection order. When considering whether there are reasonable grounds to suspect that a complainant may suffer imminent harm, the police officer must take into consideration the risk to the safety, health or wellbeing of the complainant, as well as the seriousness of the conduct which comprises an alleged breach of a protection order in terms of the Act (para [27]).

As to what constitutes imminent harm, it was found that imminent harm connotes harm that is about to happen (para [30]). On the facts of this case it was clear that the police officer (defendant) did not have reasonable grounds to suspect that the complainant might suffer imminent harm as a result of the alleged breach of the protection order. The arrest was consequently not based upon any reasonable grounds (para [35]).

Use of Lethal Force in Effecting Arrest

The four plaintiffs in *Mondlane and Others v Minister of Safety and Security* 2011 (2) SACR 425 (GNP) claimed damages from the defendant for unlawful arrest, detention and malicious prosecution. The first and second plaintiffs also sued for damages suffered by them as a result of injuries they sustained when a police officer shot and wounded them. In this matter officers from a security company responded to a call of a break-in at a music shop. The emergency call also indicated that the four suspects were driving in a Toyota Corolla at a high speed on the highway. During an ensuing car chase the plaintiffs were shot and injured. While the court held that the police had reasonable grounds for believing that the plaintiffs were indeed involved with the break-in at the music shop (the stolen music equipment was found in the car) the primary question to be determined was whether the police were justified in their use of force in effecting the arrest (para [25]).

The use of force in effecting an arrest is justified only where the arrestor believes on reasonable grounds that: he/the arrestor or anybody lawfully assisting him with the arrest or any other person needs protection from imminent or future death or grievous bodily harm and the use of force is immediately necessary for that purpose; that there is a substantial risk that the suspect will cause

imminent or future death or grievous bodily harm if the arrest is delayed; and that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm (para [32]). In terms of these requirements, the police officer who had fired the shots did not testify that, when he had fired the shots, he believed that there was a substantial risk that the plaintiffs would cause imminent or future death or grievous bodily harm if the arrest was delayed (para [34]).

Moreover, section 49(2) of the Criminal Procedure Act includes a separate requirement that the arrestor's belief must be based on reasonable grounds. In this matter this requirement was not considered as there was no evidence or testimony that the arrestor who had fired the shots held the aforementioned belief (para [35]). The use of force in this instance was accordingly held to fall outside the ambit of section 49 of the Criminal Procedure Act, and thus was unjustified and unlawful (para [36]).

In *Kotze v Minister of Safety and Security* 2011 JDR 1043 (GSJ), the plaintiff claimed damages from the defendants arising out of the fact that he was shot by members of the South African Police Service as the plaintiff and his wife tried to escape from the armed robbers that were in the process of robbing their house. The police and security personnel, however, testified that they had shouted warnings at the speeding vehicle with which the plaintiff and his wife were trying to escape and only fired shots when the vehicle did not stop as ordered. They had also heard shots fired inside the house and this alerted them to return fire.

Hartford AJ found, however, that the police had not fired any warning shots and that the alleged shouting of warnings was dubious as neither the plaintiff, his wife nor the police officers on the other side of the house could hear such warnings being shouted (para [132]). Without being sufficiently alerted in an auditory manner of the presence of the police, either by way of a warning shot, sirens or loud shouting, the plaintiff could not be reasonably be expected to have known or believed that the police had come to their rescue and were responsible for the shots being fired (para [133]).

A proper interpretation of section 49(2) of the Criminal Procedure Act furthermore requires that in addition to the requirement that the suspect be sufficiently warned of the attempt to arrest him or her, the suspect must also be afforded sufficient time to

react to the clear attempt before force is utilized. In this instance the warnings that were apparently shouted at the plaintiff preceded the firing of shots with seconds or happened simultaneously therewith (para [135]). It was found that the police in this matter did not adhere to the requirements of section 49(2), they did not make it clear to the suspects that an attempt to arrest them was being made, and did not even have reasonable grounds to believe that there was a substantial risk that the plaintiff and his wife would cause imminent or future death or grievous bodily harm to themselves (the police) or another, as none of the police officers and security personnel were under the impression that the shots that they had heard coming from the house were aimed at them (para [141]).

Fifth Jurisdictional Requirement for Valid Arrest in Terms of Section 40(1) of Criminal Procedure Act

The two plaintiffs in *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) were arrested by police officers without warrants for arrest and on suspicion of contravening section 2 of the Stock Theft Act 57 of 1959. The plaintiffs were detained for ten days before being released on bail. They were later discharged at the end of the State's case and the plaintiff's father was found guilty of stock theft.

The plaintiffs instituted a claim for damages alleging that they were arrested unlawfully. Section 40(1)*(b)* and *(g)* of the Criminal Procedure Act provides that a peace officer may arrest any person without a warrant if the peace officer reasonably suspects that person of having committed an offence referred to in Schedule 1, or if that person is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce.

The jurisdictional facts for a section 40(1)*(b)* defence include that the arrestor must be a peace officer, the arrestor must entertain a suspicion, the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1, and the suspicion must be based on reasonable grounds (*Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G–H). Both plaintiffs argued that they were arrested without any reasonable grounds. The trial court found in favour of the plaintiffs in the absence of evidence of another jurisdictional fact laid down in *Louw v Minister of Safety and Security* 2006 (2) SACR 178 (T) at 186–7. In the latter case, Bertelsmann J articulated a fifth

jurisdictional fact: police are obliged to consider in each case whether there are no less invasive options to bring the suspect before the court than an immediate detention of the person concerned. 'If there is no reasonable apprehension that the suspect will abscond or fail to appear in court if a warrant is first obtained for his or her arrest, or a notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power to arrest' (*Louw* para [10]). The Minister had appealed to the Free State High Court against this inclusion of a fifth jurisdictional fact but the High Court confirmed the trial court's judgment in this regard.

In *Sekhoto*, the Supreme Court of Appeal considered the principles governing interpretation of the Constitution and the application of the Bill of Rights in order to develop the common law (paras [14]–[18]). The court emphasized that once the jurisdictional facts for arrest are present, a discretion arises for the peace officer to effect the arrest without a warrant, or to refrain from arresting the suspect. The decision that the peace officer makes in this regard must be based on an intention to bring the arrested person to justice (para [30]). Since the Act is silent on the exact manner and process in which the discretion must be exercised, this can be deduced by inference in accordance with the ordinary rules of construction, consonant with the Constitution (para [42]). However, this discretion (and the manner in which it is exercised) does not form part of the jurisdictional facts that must be met for an arrest in terms of section 40(1)*(b)* of the Criminal Procedure Act. The court held that if the proper exercise of the discretion is included as a jurisdictional fact for arrest it follows ineluctably that the arrestor has to bear the onus of alleging and proving that the discretion was properly exercised. The Supreme Court of Appeal concluded that the court in *Louw* had conflated jurisdictional facts with the exercise of a discretion in terms of section 40(1)*(b)* of the Criminal Procedure Act (para [45]).

In another matter dealing with a valid arrest in terms of section 40(1) of the Criminal Procedure Act, *Beukes v The Minister of Safety and Security* 2011 JRD 0735 (GNP), it was held that the determination of the reasonableness of the suspicion requires a critical assessment and evaluation of all relevant information available to the arresting officer at the time of the arrest (para [12]). See also *Borain v Minister of Safety and Security* 2011 JDR 1621 (KZD), *Forbes v Minister of Safety and Security* 2011 JDR 0733 (GNP) and *Khwela v The Minister of Safety and Security* 2011 JDR 0583 (ECP).

Seizure in Terms of Section 13(8) of South African Police Services Act 68 of 1995

The applicant's motor vehicle was seized at a road block by members of the South African Police Service in *Guga v Minister of Safety and Security and Others* [2011] 1 All SA 413 (ECM). The purpose of the road block was to check for stolen vehicles by examining engine and chassis numbers, and the respondents seized the applicant's vehicle based on the discrepancies found on the engine and chassis numbers.

Whenever a search and seizure operation is conducted in terms of a warrant issued under section 21(1)*(a)* of the Criminal Procedure Act, or section 13(8) of the South African Police Service Act 68 of 1995, it must comply with the provisions of section 20 of the Criminal Procedure Act in order to be lawful (para [13]). Section 20 provides police with general powers to seize an item which is concerned in or on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, or which may afford evidence of the commission of an offence. Section 13(8) of the South African Police Service Act regulates the setting up of police road blocks and the procedure to be followed at a road block.

The element of reasonable suspicion in section 20 of the Criminal Procedure Act accordingly also applies to the seizure of items at road blocks, and the test to determine the existence of such reasonable grounds is objective (para [19]). The element of reasonable suspicion must also be present when justifying the authorization certificate for the setting up of a road block in terms of section 13(8)*(a)* of the South African Police Service Act.

In this matter the respondents could not show that the applicant's motor vehicle was an item to be seized under section 13(8), as they had failed to satisfy the jurisdictional element of reasonable suspicion as contained in section 20 of the Criminal Procedure Act.

See also *Ngqukumba v Minister of Safety and Security* 2011 JDR 1390 (ECM).

Right to Remain Silent and Section 112(2) of the Criminal Procedure Act

The appellant in *Tshabalala v S* 2011 (1) SACR 497 (GNP) was charged and convicted on two counts of fraud and two counts of forgery. His legal representative withdrew shortly before the

charges were put to the appellant. However, before withdrawing, the legal representative indicated that he had thoroughly discussed the case with the appellant and that the appellant intended to plead guilty. The appellant subsequently decided to continue without legal representation and pleaded guilty on all counts. The appellant subsequently appealed against both the convictions and sentences, arguing that the magistrate erred in not warning him that he had a right to remain silent when the provisions of section 112(2) of the Criminal Procedure Act were explained to him.

The rationale behind section 112(2) is to determine whether an accused truly admits to all of the elements of the charges against him/her and to determine whether there is a possible defence for the accused's actions. It has been said that to warn the accused of his right to remain silent shortly before the section 112(2) questioning actually conflicts with the spirit of the section and possibly obstructs the accused from giving information that may be to his advantage to divulge (para [6]; *S v Mabaso and Another* 1990 (3) SA 185 (A) at 201C–E; *S v Nkosi and Another* 1984 (3) SA 345 (A) at 353D–E). However, divergent views exist on whether an accused must be warned about his/her right to remain silent before answering questions in terms of section 112(2) of the Criminal Procedure Act (see *S v Maseko* 1996 (2) SACR 91 (W); *S v Damons and Others* 1997 (2) SACR 218 (W) at 224E–F and 224B; *Director of Public Prosecutions Natal v Magidela and Another* 2000 (1) SA 458 (SCA) at 465–6).

Mavundla J held that to decide whether there is an obligation to inform the accused of his right to remain silent when being questioned in terms of section 112(2) of the Criminal Procedure Act must be answered in the context of the right to remain silent, and in terms of section 39(2) of the Constitution, which provides that when interpreting legislation and/or developing the common law, every court must promote the spirit, purport and object of the Bill of Rights (para [11]). It was submitted that an accused person cannot selectively be informed of his or her right to remain silent (para [17]). Especially where an accused is unrepresented, he or she must be informed of the right to remain silent at all relevant stages of the criminal proceedings. Section 35(3)*(j)* of the Constitution ensures that self-incriminating evidence cannot be solicited from an accused person directly or indirectly. It is accordingly necessary for the accused also to be informed of the right to remain silent before he or she pleads guilty and answers

questions in terms of section 112(2) of the Criminal Procedure Act (para [19]).

Where an accused has not been informed of this right before the section 112(2) questioning, a procedural irregularity has taken place. And whether this irregularity will vitiate the trial must be decided on a case-by-case basis (para [20]). (Here it was decided that the appellant was not prejudiced by the fact that the magistrate did not inform him of his right to remain silent before the questioning in terms of section 112(2) of the Criminal Procedure Act.)

Permanent Stay of Prosecution

The applicant in *Brown v The National Director of Public Prosecutions* 2011 JDR 1269 (WCC) was arrested on different occasions from March 2007 to 31 January 2011 and charged with, inter alia, theft and fraud. There was also a warrant for his wife's arrest, but she had left the country together with their two minor children without informing the DSO. After each arrest the applicant was released on bail and on 10 December 2008, the applicant launched an application for a permanent stay of prosecution. He withdrew this application on 10 November 2009 but again applied for a permanent stay in the proceedings which was launched on 31 January 2011. The applicant applied for the immediate and permanent stay of the prosecution on the following basis: the misconduct and partiality of the prosecutor and the investigating officers of the DSO in respect of the criminal charges against him, the unlawful conduct of certain prosecutors of the former DSO and investigating team to appoint an attorney of their choice to represent him in respect of plea bargain negotiations whilst he was medically unfit and incarcerated at Pollsmoor during 2008, and the wide and adverse media coverage against him in respect of the Fidentia Group allegations and charges, which has resulted in the general public, some judicial officers and lawyers viewing him as a fraudster and thief having stolen billions from widows and orphans (para [18]).

It is generally accepted that a permanent stay of prosecution is a drastic remedy and either party may apply to a court for such a stay of proceedings which may be on a temporary or permanent basis (para [22]). It is furthermore a matter that lies completely within a court's discretion as there are no guidelines to be followed, but each case will be decided on its own merits. This discretion of courts to grant a stay of prosecution ought to be

exercised sparingly and only in exceptional circumstances (para [23]). The party applying for such a stay in the proceedings must prove that their right to a fair trial had been infringed upon and that this remedy is the only viable option. The likelihood of being prejudiced by external factors is not sufficient; the party must prove that there is irreparable trial related prejudice, and that the extraordinary circumstances justify this radical remedy. If the prejudice suffered is not trial related, then other (less drastic) remedies must be considered (paras [24]–[25]).

In this instance the applicant's application was based on the fact that the respondents had shown vindictiveness, prejudice and animosity towards him, and that he had committed no criminal act, but that the respondents were fabricating the allegations against him (para [35]). The respondents denied these allegations in its entirety and held that by virtue of the profile of the matter and the magnitude of the charges, it was inevitable that the media would report widely on the matter (para [53]). While the court dismissed the applicant's contention that the prosecution was vindictive and partial, the court did agree that there was indeed adverse media coverage in the applicant's case. It was said that objectively speaking, the perception was created in the media that there had already been a pronouncement on the allegations against the applicant. Yet, for a permanent stay of prosecution the applicant had to prove that the adverse media coverage gave rise to trial related prejudice, and that it would lead to an unfair trial. The applicant also had to prove that there were extraordinary circumstances that were applicable to his case (para [93]).

The rights that have to be balanced in a matter like this are the right to open justice, the right to freedom of expression and the right to a fair trial (para [98]). It must furthermore be noted that presiding officers (in terms of the South African legal system) are impartial when sitting in their official capacity. A judge is a person of high integrity and honesty and judges take an oath when they are appointed to uphold the law and to administer justice in an appropriate manner (para [105]). Judges furthermore have years of experience and are aware of the dangers of media reports in 'high profile' cases. A judge will therefore review each case based on its own merits (para [115]).

While the media coverage had been adverse in this case, the court held that the applicant did not succeed in showing a link between the adverse media coverage and the effect that it would

have on the evidence that would be presented during the trial and how it would result in the applicant not having a fair trial (para [119]). Since the applicant could also not prove that the prosecutors and investigators were guilty of misconduct, impartiality and unlawful conduct, the application for a permanent stay of prosecution was not granted.

Adjournment of Proceedings in Terms of Section 168 of Criminal Procedure Act

The trial magistrate in *Director of Public Prosecutions KwaZulu-Natal v Regional Magistrate TW Levitt* 2011 JDR 0352 (KZP) refused an application by the applicant to adjourn the matter (case no 23/16447/2008) and as a consequence forced the applicant to close its case. An application for the discharge of the accused in that case was consequently granted. The applicant now sought an order reviewing and setting aside the initial order made by the respondent to not allow a further adjournment.

In terms of section 168 of the Criminal Procedure Act, a magistrate has the power to adjourn proceedings, if the court deems it necessary or expedient to do so. It is a decision completely under the discretion of the magistrate and may not be interfered with except on the ground that the magistrate had not exercised a judicial discretion. The decision must depend upon the material facts of the particular case and an appeal court may furthermore not substitute its discretion for that of the magistrate merely on the ground that it would have come to a different conclusion (paras [5]–[6]).

In this matter the prosecutor had asked for an adjournment once before because his witnesses were not available, and on the return date yet another witness was not available, and since he had not subpoenaed the witness he again asked for an adjournment. He initially indicated to the magistrate that he only had one further witness to call, but later, after taking the magistrate's decision on review, the prosecutor indicated that he had more than one witness that he still wanted to call in support of his case. Another factor that had to be considered in this case was that if the matter had been adjourned, the earliest possible date would have been at least six months later (para [10]). The prosecutor later admitted that it was due to his neglect that the necessary witnesses were not in attendance. This was a serious neglect, since the State had at least four months to secure the attendance of their witnesses (para [11]).

Swain J held that the magistrate in this case had not failed to exercise the discretion judicially. All of the evidence led against the accused up to that stage of the proceeding was considered, and the nature and materiality of the evidence which the State wished to lead was also considered together with the history of the matter, the need for the previous adjournment and the possible prejudice against the accused if the matter was to be adjourned again (paras [12]–[13]). The applicant's application for the review and setting aside of the order made by the trial magistrate was therefore unsuccessful.

Duty to Bring Arrested Persons before Court within 48 Hours of Arrest

The plaintiffs in *Hash v The Honourable Minister of Safety and Security* 2011 JDR 0930 (ECP) claimed damages for their alleged wrongful and unlawful arrest and detention and for malicious prosecution. The plaintiffs were arrested on 1 July 2007 (a Sunday evening) without a warrant and detained on a charge of robbery with aggravating circumstances. They appeared before a magistrate on 4 July (they appeared on a Wednesday morning and the 48 hour detention period actually expired on the Tuesday evening) and the matter was remanded to 11 July 2007. The magistrate ordered that the plaintiffs be held in custody. On 11 July 2007, the plaintiffs were released on bail and the matter was further remanded to 24 August 2007, on which date all charges against the plaintiffs were withdrawn.

Section 50(1)*(c)* of the Criminal Procedure Act provides that an accused be brought before a court as soon as reasonably possible and not later than 48 hours after arrest. This provision is subject to section 50(1)*(d)*, which provides that if the 48 hours expire outside ordinary court hours, or on a day which is not an ordinary court day, the accused must be brought before a court not later than the end of the first court day.

In *Prinsloo v Nasionale Vervolgingsgesag en Andere* 2011 (2) SA 214 (GNP), section 50(1)*(d)* was interpreted to mean that if the 48 hours within which the accused person must have been brought before a court expire outside normal court hours, or on a day which is not a normal court day, then the accused must be brought before a court during and not later than the end of the first court day after his arrest. On an acceptance of this interpretation, the plaintiffs in this matter had to be brought before a court on the first day of their arrest — Monday 2 July (para [70]).

However, Eksteen J did not agree with this interpretation and reasoned that it would give rise to absurd results which the legislature could not have envisaged. Section 50(1)*(d)* of the Criminal Procedure Act is clear: a detained person must be brought before a court as soon as reasonably possible, but not later than 48 hours, after the arrest. And, what is reasonable would depend on all the circumstances of each case (para [71]). In this case the plaintiffs were held to have appeared on the first court day after the lapse of 48 hours as is required by section 50 (para [72]).

Right to Legal Representation and Section 26(6) of the Prevention of Organized Crime Act 121 of 1998

The legal question in *Naidoo v National Director of Public Prosecutions* 2011 JDR 0937 (CC) was whether a court that issued an order restraining an accused from dealing with his/her assets in terms of the Prevention of Organized Crime Act 121 of 1998 (POCA), may allow for such an accused's legal expenses to be incurred from assets held by a person other than that accused.

The relevant provision of the POCA, section 26(6), provides that a restraint order may make provision for the reasonable living expenses of a person against whom the restraining order is made as well as that of his or her family or household, and for the reasonable legal expenses of such person in connection with any proceedings instituted against him or her in terms of any criminal proceedings to which such proceedings may relate.

The applicant in this case was charged with 119 counts of dealing in unwrought metals, and the first respondent had obtained a restraint order against the accused and his former spouse with whom the accused still shared a house. The order against the accused's estranged spouse related to specified assets which constituted an affected gift to her by the accused and in terms of section 12(1) of the POCA. These assets included two companies of which the accused's wife was the sole director and shareholder.

In the High Court, it was held that the property held by the accused's former wife in fact belonged to the accused. This was considered a logical conclusion of the restraint order the purpose of which was to restrain the property of the accused. The properties' legal status was therefore regarded as belonging to the accused, and it could be utilized in paying for the accused's

legal expenses (para [7]). The Supreme Court of Appeal interpreted section 26(6)*(a)* of the POCA to mean that a restraint order may make provision for the legal expenses of only a person against whom that restraint order is being made. It was consequently held that the assets which the accused's former wife controls could not make provision for the legal expenses of the accused, as he was not the person against whom that specific restraint order was made (para [9]).

The applicant argued that he had the right to employ legal representatives of his choice, and that section 26(6)*(b)* of the POCA should be interpreted broadly so as to give effect to his right to a fair trial (para [11]). It was also argued that the property restrained as an 'affected gift' should be regarded as the property of the person who had made that gift since, under the common law, if the object of an underlying contract is illegal or unlawful, the transfer of the ownership is void (para [12]). And in the alternative, it was argued that if the restrained property was in fact property held by the accused's ex-wife and her two companies, the provisions could still yield an interpretation that favoured the accused, as the phrase 'against whom the restraint order is made' does not appear in section 26(6)*(b)* (para [13]).

The respondents submitted that the accused's ex-wife had not been charged with any criminal offences, and she had also not made any disclosures of assets in terms of section 26(6). To allow, therefore, that provision be made for the accused's legal cost from property held by her would create the possibility of abuse by accused persons seeking a subsidy for their legal expenses from restrained assets held by others and may frustrate the very purpose of restraint proceedings, which is to prevent offenders from reaping the benefits of their crimes (para [15]).

In the case before the Constitutional Court it was found that section 26(6) does create a mechanism through which an unconvicted accused can access restrained assets held by him or her for reasonable legal expenses, as well as living and household expenses. The primary purpose of this provision is accordingly not to punish an unconvicted accused but to strip from offenders the benefits of their crimes (para [18]). Yet, the express terms of section 26(6) make allowance for reasonable living and legal expenses only on limited terms. The access is granted only for the legal expenses of a person against whom the restraint order was made and it is conditional on full disclosure. The person must also not be able to meet the said expenses out

of his or her unrestrained property (para [20]). The provisions of the POCA (ss 26(1), 12 and 14) accordingly permit restraint orders to be made only against realizable property held by the person against whom the order is made and not against realizable property held by another person (para [23]). It was concluded that

> '[t]o interpret the wide discretion conferred by s 26(1) as permitting an override of the preconditions expressly set in s 26(6) would run counter to the scheme of the provisions as a whole. The provision for reasonable legal and living expenses in s 26(6) is narrowly and finely crafted. . . . And its overall legislative purpose must be borne in mind. It is to discourage defendants who face criminal prosecution from hiding their assets. If a defendant retains the alleged proceeds of crime, they remain available for living and legal expenses. But if these assets are donated away, they become unavailable for this purpose' (para [30]).